UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 85

Docket No. NY-0752-09-0128-I-1

Robert L. Woebcke,

Appellant,

v.

Department of Homeland Security,

Agency.

May 6, 2010

Thomas G. Roth, Esquire, West Orange, New Jersey, for the appellant.

Cheryl Scott-Johnson, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The agency has petitioned for review and the appellant has cross petitioned for review of the initial decision that mitigated the appellant's removal to a 14-day suspension. For the reasons discussed below, we find that the agency's petition and the appellant's cross petition do not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY them. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still MITIGATING the removal penalty to a 14-day suspension.

BACKGROUND

¶2 The agency removed the appellant from the position of Federal Air Marshal (FAM) with the Transportation Security Administration (TSA or agency) for conduct unbecoming a FAM and a missed mission. Initial Appeal File (IAF), Tab 6, Subtabs 4e, 4b. Specifically, the agency charged as follows: That, on May 31, 2007, while on official travel status for a mission, the appellant was arrested for Public Street Solicitation of Prostitution by the Honolulu, Hawaii, Police Department, eventually entering a plea of nolo contendere; that the appellant's June 1, 2007 return mission was cancelled and not recovered; and that the appellant and his partner returned to their duty station, Newark, New Jersey, on June 2, 2007. *Id.*, Subtab 4e.

¶3 The appellant appealed the agency's action, alleging that the agency committed harmful error because the proposing and deciding officials had communications with other individuals within the agency resulting in the originally suggested penalty of a 5-day suspension being increased to a removal. IAF, Tab 1. He also alleged, as he had in the response to the charges that he made to the deciding official, that the penalty of removal was unreasonable in light of the mitigating factors applicable under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). IAF, Tab 1.

¶4 The administrative judge found, after a hearing, that the agency proved the charges by preponderant evidence. IAF, Tab 32 (Initial Decision (ID)), at 6-7. She found also that the decision reached with regard to the penalty imposed on the appellant would have been a lesser penalty had the proposing and deciding officials not received guidance from the agency's Policy and Compliance Unit (PCU) and its Employee Relations office. ID at 7-12. She found further, however, that this guidance did not constitute improper ex parte communications and thus the appellant failed to prove harmful error. *Id.*

¶5 Finally, the administrative judge found that the agency established that discipline for the proven misconduct promotes the efficiency of the service, but

that the agency failed to establish that the penalty of removal was within the tolerable limits of reasonableness and she mitigated the removal to a 14-day suspension. ID at 12-38. In mitigating the penalty, the administrative judge found that the deciding official gave improper weight to some *Douglas* factors and completely ignored others. ID at 16. She found also that the deciding official improperly considered a statement in the police report that the appellant had solicited a prostitute on a prior occasion because the deciding official had not informed the appellant that he was relying on that statement and the record shows that the appellant did not make such a statement. ID at 19. She found further that the deciding official was not credible in stating that the fact that he permitted the appellant to qualify for firearms training during the 15-month interval between the occurrence of the charged misconduct and the issuance of the notice of proposed removal was not a showing that he thought that the appellant had rehabilitative potential. ID at 19-23. She determined that the deciding official did not give sufficient weight to the appellant's documented depression over a number of life events recently preceding the misconduct that contributed to it. These life events included the death of his mother, the deaths of his wife's father and mother, the loss of twin sons about 6 months into his wife's difficult pregnancy, and the near loss of his wife as a result of much bleeding during the premature birth of the stillborn twins. ID at 26-41. Additionally, the administrative judge found that the penalty was excessive given that similarly-situated FAMs who had solicited prostitutes in Germany had received 14-day suspensions. ID at 31-38. The administrative judge noted that, in Germany, prostitution is not illegal. Nonetheless, solicitation constitutes conduct unbecoming a FAM and, as noted, the agency charged both the FAMs who solicited prostitutes in Germany and the appellant with conduct unbecoming a FAM for soliciting prostitution. ID at 31-38.

¶6 The agency has filed a petition for review. Petition for Review File (PFR File), Tab 1. The appellant has responded to the agency's petition and filed a

cross petition for review. PFR File, Tab 3. The agency has responded in opposition to the appellant's cross petition for review. PFR File, Tab 5.

ANALYSIS

The Agency's Petition for Review

¶7 Where, as here, all of the agency's charges have been sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Stuhlmacher v. U.S. Postal Service*, 89 M.S.P.R. 272, ¶ 20 (2001); *Fowler v. U.S. Postal Service*, 77 M.S.P.R. 8, 12, *review dismissed*, 135 F.3d 773 (Fed. Cir. 1997) (Table); *Douglas*, 5 M.S.P.R. at 306. In determining whether the selected penalty is reasonable, the Board gives due deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency. *Stuhlmacher*, 89 M.S.P.R. 272, ¶ 20; *Fowler*, 77 M.S.P.R. at 12; *Douglas*, 5 M.S.P.R. at 306. The Board recognizes that its function is not to displace management's responsibility or to decide what penalty it would impose, but to assure that management judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness. *Stuhlmacher*, 89 M.S.P.R. 272, ¶ 20; *Fowler*, 77 M.S.P.R. at 12; *Douglas*, 5 M.S.P.R. at 306. Thus, the Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness. However, if the deciding official failed to appropriately consider the relevant factors, the Board need not defer to the agency's penalty determination. *Stuhlmacher*, 89 M.S.P.R. 272, ¶ 20; *Omites v. U.S. Postal Service*, 87 M.S.P.R. 223, ¶¶ 10-11 (2000); *Wynne v. Department of Veterans Affairs*, 75 M.S.P.R. 127, 134 (1997).

¶8 The factors relevant for consideration in determining the appropriateness of a penalty were set out by the Board in *Douglas*, 5 M.S.P.R. at 306. While not

purporting to be exhaustive, the Board identified the following factors: (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. *Id*. at 305-06. Not every factor will be present in every appeal and, as noted above, the list is not exhaustive.

¶9 In its petition, the agency asserts that the administrative judge improperly substituted her judgment for that of the deciding official regarding the penalty. The agency asserts that the administrative judge considered the same factors considered by the deciding official, the appellant’s depression, his length of service, his lack of prior discipline, his formerly satisfactory performance, and his potential for rehabilitation.

¶10 In her lengthy and complete discussion of whether the penalty was within the bounds of reasonableness in this case, the administrative judge carefully discussed the deciding official's testimony regarding the weight that he afforded the *Douglas* factors that he found relevant. She deferred to the weight that the deciding official afforded the appellant's length of service, his lack of prior discipline, and his formerly satisfactory performance. However, she found that the deciding official's testimony regarding the heavy weight that he afforded the appellant's lack of rehabilitative potential was not credible and thus not entitled to deference for three reasons.

¶11 First, she discussed the deciding official's testimony that he relied on the difference between what the appellant initially told him had occurred on the date of the misconduct and what actually occurred, as later recounted by the appellant. However, relying on the fact that the deciding official admitted on cross examination that the only difference between the two accounts was the level of detail that the appellant provided in his later recounting, she found that the appellant had told consistent stories and thus the deciding official improperly relied on what he characterized as differing accounts of what happened to conclude that the appellant lacked rehabilitative potential. ID at 18.

¶12 Second, she discussed the deciding official's testimony that he relied on entries in the police report with regard to two utterances that the appellant allegedly made while he was being processed at the police station. *Id*. The first alleged utterance was that the appellant sought special treatment or professional courtesy and the second was that the appellant admitted that this was not the first time he had solicited a prostitute. ID at 18-19. As to the first alleged utterance, the deciding official admitted that he believed that the appellant had merely advised the Hawaii police that he was a FAM in response to an inquiry about his purpose for being in Hawaii. As to the second alleged utterance, the administrative judge found, based on the record before her, that the appellant did

not make that statement and that the deciding official improperly considered this alleged statement because he failed to address it with the appellant. ID at 19.

¶13 Finally, with regard to the appellant's potential for rehabilitation, the administrative judge found that the deciding official's own conduct belied his testimony. The administrative judge noted that the record showed that the deciding official had allowed the appellant to update his firearms training on the belief that the appellant would be returning to work after a short suspension, thus evidencing confidence in the appellant's rehabilitative potential. ID at 19-23. Under the circumstances of this case, there is no sufficiently sound reason to overturn the administrative judge's credibility determination. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002) (the Board must give deference to an administrative judge's credibility determinations when they are based on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so). The administrative judge did not err in not deferring to the deciding official's assessment of the appellant's potential for rehabilitation and making an independent assessment of that *Douglas* factor.

¶14 The administrative judge also carefully explained why she found that the deciding official did not give the evidence of the appellant's depression sufficient weight. The administrative judge noted that the deciding official had minimized the opinion of the appellant's treating physicians that the appellant's misconduct would not likely recur. She noted that the deciding official gave little weight to this opinion evidence, relying instead on the statement in the police report that the appellant admitted that this was not the first time that he had solicited a prostitute. ID at 24-25. As explained above, the administrative judge found that the deciding official improperly relied on this statement because he did not address it with the appellant and, more importantly, she found that the appellant did not make that statement. Because the record shows that the deciding official's failure to credit the opinion testimony of the appellant's physicians was

predicated on erroneous information, the administrative judge did not err in finding that the deciding official failed to give that evidence sufficient weight.

¶15 As the administrative judge found, the Board has held that evidence that an employee's medical condition or mental impairment played a part in the charged misconduct is ordinarily entitled to considerable weight as a mitigating factor. *See Sherlock v. General Services Administration*, 103 M.S.P.R. 352, ¶ 12 (2006); *Roseman v. Department of the Treasury*, 76 M.S.P.R. 334, 345 (1997). Moreover, the Board has found that a medical or mental impairment is not a significant mitigating factor in the absence of evidence that the impairment can be remedied or controlled, i.e., when the potential for rehabilitation is poor. *See Mingledough v. Department of Veterans Affairs*, 88 M.S.P.R. 452, 458 (2001). Even where the medical condition or mental impairment does not rise to the level of a disability, if the agency knows about it before taking the action, such condition may be considered in mitigating the penalty. *Roseman*, 76 M.S.P.R. at 345. The Board has also found that it is not necessary to demonstrate that an appellant's actions were beyond his control for a mental impairment to be considered as a mitigating factor. *See Slaughter v. Department of Agriculture*, 56 M.S.P.R. 349, 354-55 (1993). Nor is the appellant required to show through medical evidence that such condition contributed to the misconduct at issue. *Id.* at n.11. The Board has found that affidavits that provide specific evidence regarding the manner in which an appellant's emotional condition may have influenced the misconduct may lend support to a finding that the appellant was suffering from emotional problems and may therefore be considered. *Id.* at 355-56.

¶16 Here, the appellant not only provided medical reports to support the fact that at the time of the misconduct he was suffering from depression, but Brenda Shelley-McIntyre, Ph.D., gave unrefuted testimony indicating that the appellant's depression was a contributing factor to the misconduct in question. She testified that she began treating the appellant shortly after the incident in question and has

been treating him for approximately 2 years at intervals of once a week. Hearing Transcript (HT) at 15, 22. She testified that the appellant was depressed before the incident took place and based her opinion on the course of events in the appellant's life over several years preceding the misconduct. HT at 17. Among these were: the death of the appellant's mother; the death of his wife's mother and father; and his wife's miscarriage after a difficult pregnancy. HT at 18-19.

¶17 Dr. Shelley-McIntyre testified that the miscarriage was especially stressful because the appellant and his wife were expecting twins as the result of a third attempt at in vitro fertilization and 6 months into the pregnancy, the appellant's wife miscarried. HT at 19. She testified that the appellant's wife's life was in danger due to bleeding at the time of the miscarriage and the appellant put aside his own feelings to console his wife, disallowing him the opportunity to grieve himself. HT at 19. She testified that, because of the stress, the appellant and his wife argued, including having an all-night argument the night before the appellant left on his assignment to Hawaii. HT at 20-21. She testified that the confluence of all of these events, the deaths, the compounded losses, the difficult pregnancy, and the couple falling apart, all caused the appellant to fall apart and created a situation where he made an error in judgment. HT at 21. She testified that, nonetheless, the appellant accepted full responsibility for his actions. *Id*. She testified that the likelihood of recurrence of the appellant's misconduct was "nil to nonexistent." HT at 26.

¶18 The administrative judge found Dr. Shelley-McIntyre's testimony extremely credible, ID at 30, and we find no reason not to defer to this finding, *see Haebe*, 288 F.3d at 1301. We also find that Dr. Shelley-McIntyre's testimony has probative value because she provided a reasoned explanation for her medical opinions. *See Stevens v. Department of the Army*, 73 M.S.P.R. 619, 627 (1997) (in assessing the probative value of medical opinion evidence, the Board considers the qualifications of the medical expert, her familiarity with the

appellant's condition, and whether her opinion provides a reasoned explanation for her findings).

¶19 In its petition, the agency contends further that the administrative judge improperly compared the appellant's discipline with invalid comparators in the New York Field Office and ignored evidence that two FAMs in the New York Field Office who committed similar misconduct were terminated. The agency's file contains sanitized copies of the decisions removing two FAMs for solicitation of prostitution in about February and March 2008 while on an international mission. IAF, Tab 6, Subtab S. However, the appellant raised an allegation that the agency treated him disparately by submitting sanitized copies of 6 decisions giving 14-day suspensions to FAMs who were charged with conduct unbecoming for solicitation of a prostitute in about February 2008. IAF, Tab 22, Exhibit A.

¶20 An appellant's allegation that the agency treated him disparately as compared to another employee, without a claim of prohibited discrimination, is an allegation of disparate penalties to be proven by the appellant and considered by the Board in determining the reasonableness of the penalty, but it is not an affirmative defense. *See Vargas v. U.S. Postal Service*, 83 M.S.P.R. 695, ¶ 9 (1999). As noted above, the consistency of the penalty with those imposed upon other employees for the same or similar offenses is only one of the factors to be considered under *Douglas* in determining the reasonableness of an agency-imposed penalty. *See Thomas v. Department of Defense*, 66 M.S.P.R. 546, 552, *aff'd*, 64 F.3d 677 (Fed. Cir. 1995) (Table). To establish disparate penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar. *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983). Where an employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *See Lewis v. Department of Veterans*

Affairs, 111 M.S.P.R. 388, ¶ 8 (2009); *Woody v. General Services Administration*, 6 M.S.P.R. 486, 488 (1981).

¶21 The administrative judge carefully considered the consistency of the penalty imposed on the appellant with the penalties imposed upon other employees for the same or a similar offense. ID at 31-38. The administrative judge found that the appellant learned through discovery that about 9 or 10 months after the appellant's misconduct, and before the agency selected the penalty for the appellant, a number of FAMs had traveled to Germany, gotten drunk and solicited prostitutes. ID at 35-36. She found the FAMs who had solicited prostitutes in Germany, who were not team leaders, had received 14-day suspensions for their misconduct based on the charges of conduct unbecoming and not being prepared for duty, which are similar to the charges of conduct unbecoming and a missed mission that the appellant received. *Id*. The administrative judge noted that the agency only removed the team leader involved in the incident in Germany and removed him based on charges in addition to conduct unbecoming and not being prepared for duty. ID at 37-38. The administrative judge distinguished that case with her finding that the record established that the FAM who was removed was a team leader who had additional charges brought against him. *Id*. She found the appellant was not a team leader on his assignment to Hawaii. ID at 38.

¶22 Under the circumstances of this case, the appellant has raised an allegation of disparate penalties in comparison to specified employees and the agency has failed to prove a legitimate reason for the difference in treatment by a preponderance of the evidence. *See Lewis*, 111 M.S.P.R. 388, ¶ 8. Further, the administrative judge's consideration of the consistency of the penalty with those imposed upon other employees from another office is consistent with the recent decision of the U.S. Court of Appeals for the Federal Circuit in *Williams v. Social Security Administration*, 586 F. 3d 1365 (Fed. Cir. 2009). In that decision, the court held that, although the fact that two employees are supervised by different

individuals may sometimes justify different penalties, an agency must explain why differing chains of command would justify different penalties. *Williams*, 586 F.3d at 1368. The court's finding specifically criticized the finding by the administrative judge deciding Williams's appeal that treating employees disparately is not relevant when the employees are in different chains of command. *Id*. Thus, the administrative judge here properly considered disparate penalties in comparison to specified employees and correctly substituted a 14-day suspension for the removal penalty. Where, as here, the administrative judge has made credibility determinations based on the factors set forth in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), and the Board discerns no sufficiently sound reason to overturn these determinations under *Haebe*, we will not second guess the administrative judge.

The Appellant's Cross Petition for Review

¶23 In his cross petition for review, the appellant reiterates his argument below that agency officials engaged in prohibited ex parte communications. PFR File, Tab 3. The administrative judge addressed this argument in the initial decision and properly found that agency officials had no improper ex parte communications. Therefore, we deny the appellant's cross petition for review.

ORDER

¶24 We ORDER the agency to cancel the removal and substitute in its place a 14-day suspension without pay. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶25 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under TSA's Management Directive and Handbook regarding back pay, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits

due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶26 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶27 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶28 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶29 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in

Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.